In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 724

RAYMOND E. WADE, ET AL., D/B/A CADILLAC TOOL & DIE COMPANY AND WAYNE DIE & ENGINEERING COMPANY, APPELLANTS

v.

HENRY L. STIMSON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

These motions are filed by the appellees pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement as to Jurisdiction and other papers filed by the appellants, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellants in the District Court of the United States for the District of Columbia to enjoin appellees from collecting under the provisions of the Renegotiation Act excessive war profits determined to have been realized by appellants. A specially consti-

tuted three-judge court was convened pursuant to the Act of August 24, 1937 (c. 754, § 3, 50 Stat. 751, 752, 28 U. S. C. 380a). On April 10, 1946, the court handed down its opinion, reported at 65 F. Supp. 277, sustaining appellees' motion for a summary judgment and holding that this case is governed by the decision of this Court in *Macauley* v. *Waterman Steamship Corp.*, No. 435, October Term, 1945, decided March 25, 1946, as well as by the cases of *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371, and *Aircraft Diesel Equipment Corp.* v. *Hirsch,* 62 F. Supp. 520 (D. D. C.), now pending on appeal before this Court, No. 95, this Term. Appellants' petition for appeal was allowed by the court below on October 29, 1946.

STATEMENT OF FACTS

The appellants are partners doing business at two locations in Detroit, Michigan, under the names of Cadillac Tool & Die Company and Wayne Die & Engineering Company. In each instance the business of appellants is the precision manufacture of machine tools.

In September 1944, the Under Secretary of War determined that during the year 1942 Cadillac Tool & Die Company and Wayne Die & Engineering Company realized excessive war profits in the amounts $215,000 and $230,000, respectively, and directed that these amounts, less the appropriate tax credits, be refunded to the United

States.[1] Upon the failure of appellants to make the refunds and since they were subcontractors for purposes of renegotiation, withholding orders were issued to prime contractors with whom appellants had had contracts.[2]

In November 1944, appellants instituted this action against "Henry L. Stimson, Secretary of War, and Robert P. Patterson, Under Secretary of War," averring, *inter alia,* that the Renegotiation Act was unconstitutional and praying that the court restrain appellees from carrying into effect the withholding orders, that the court "decree that no excessive profits were made by the Cadillac Tool & Die Company and Wayne Die & Engineering Company during the period of 1942," and that the court determine that appellants "did

[1] As shown by the affidavit of Colonel Feast, dated August 11, 1945, the tax credit applicable to the $215,000 excessive war profits realized by Cadillac was $102,413.84, leaving a net renegotiation liability of $112,586.16. Wayne had a tax credit of $43,582.87 applicable to its $230,000 excessive war profits, leaving a net renegotiation liability of $186,417.13.

[2] The affidavit of Colonel Feast shows that only $1,413.50 was collected by means of the withholding orders issued in connection with the sums owed by Cadillac, while $1,065.06 appeared to be the total amount collectible under withholding orders issued with reference to Wayne's excessive war profits. On June 8, 1945, the Attorney General was requested by the War Department to institute suit against Cadillac to collect the balance due the United States. Similar action was planned in the case of Wayne. Appropriate action will be taken by the Government to protect its interests in these matters.

not come within the purview of the Renegotiation Act of 1942 if the same is held valid."[2]

The court below granted appellees' motion for summary judgment on the authority of *Macauley* v. *Waterman Steamship Corp., supra, Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371, and *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 62 F. Supp. 520 (D. D. C.).

DISCUSSION

There is now pending before this Court the case of *Aircraft & Diesel Equipment Corp.* v. *Hirsch, et al.,* No. 95, this Term, involving substantially the same jurisdictional questions which are here present, and we submit that an affirmance by this Court of the decision below in that case will be completely dispositive of the appeal herein. In these circumstances, it is respectfully requested that no action be taken by this Court in the instant case until that case is decided. If the decision in the *Aircraft & Diesel* case is affirmed, in accordance with the Government's contentions, it is submitted that the decision below should likewise be affirmed, or the appeal dismissed, for the following reasons:

[2] Appellants also instituted two proceedings in the Tax Court of the United States which are now pending, one in the name of Cadillac Tool & Die Company and the other in the name of Wayne Die & Engineering Company, seeking determinations as to their liability under the Renegotiation Act for excessive war profits, if any, for the year 1942.

1. *The instant suit is premature as appellants have failed to exhaust their administrative remedy.* Appellants have filed with the Tax Court of the United States, pursuant to Subsection 403 (e) of the Renegotiation Act, 58 Stat. 78, 86–87, 50 U. S. C. Supp. V, App. § 1191, their petitions for a determination of excessive war profits, if any, which they realized during the year 1942. That Subsection provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or sub-contractor * * *." The proceedings instituted in the Tax Court by appellants are still pending.

In these circumstances, it is submitted that the appellants are premature in bringing suit in the District Court prior to a determination by the Tax Court, and that the decision of this Court in *Macauley* v. *Waterman Steamship Corporation, supra,* is controlling.

2. *Appellants have an adequate remedy at law.* Appellants' suit for an injunction is predicated upon the allegation that they will suffer irreparable injury by reason of the withholding orders issued by the Government in endeavoring to collect excessive war profits determined to have been realized by appellants. As is shown by the affidavit of Colonel Feast, dated August 11, 1945, only $1,413.50 was collected by means of the withholding orders issued with reference to Cadillac

Tool & Die Company, and only $1,065.06 had been similarly collected in connection with excessive war profits earned by Wayne Die & Engineering Company. The affidavit also showed that it was found to be impossible to make the necessary collections by means of withholding orders, and therefore it was determined to refer the matter to the Attorney General for the purpose of instituting a collection suit against appellants. Furthermore, as was shown at the hearing before the court below, the withholding orders were not "interfering with" or "affecting" the business of appellants (Transcript of Proceedings, pp. 66, 71–72).

As to sums in excess of those collected by withholding, appellants have an adequate remedy by way of defense to any suit brought by the Attorney General. It is submitted that they likewise have an adequate remedy at law with respect to any injury resulting from the withholding orders. They could bring action against any contractor to whom a withholding order had been issued to require the payment of whatever sums they believed to be owing. The contractor could set up by way of defense the withholding order, which would afford adequate opportunity for a determination of the constitutionality of the Renegotiation Act pursuant to the provisions of which the withholding orders were issued. This Court has specifically held that such a procedure affords an adequate remedy at law in *Coffman*

v. *Breeze Corporations,* 323 U. S. 316, involving the Royalty Adjustment Act.

3. *This is a suit against the United States to which the United States has not consented.* This case is also governed, it is submitted, by the decision of this Court in *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371. In that case a renegotiation order had been issued and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the district court to enjoin such withholdings was held barred by the absence of the United States as a party because the effect of the relief sought would be to compel the payment of money from the Federal Treasury.

The decision in the *Mine Safety* case would seem to be clearly applicable to this proceeding. As is shown in the affidavit of Colonel Feast, amounts withheld by prime contractors have either been paid into the United States Treasury or are being held for the account of the United States. Furthermore, there is no principle of law which restricts sovereign immunity, where the suit is nominally against a government officer, to cases where the relief sought would involve payment from the government treasury. Cf. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Belknap* v. *Schild,* 161 U. S. 10.

Congress has consented to suit in the Tax Court concerning questions arising under the Renegotiation Act. Congress has not consented, however, to initial review of such questions by suit for injunctive relief in the district courts. On the contrary, Congress has carefully sought to bar such jurisdiction by giving the Tax Court exclusive jurisdiction over such questions. Cf. *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459.

CONCLUSION

It is respectfully submitted that this case should be held pending a decision in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, No. 95, this Term, and that if the decision of the District Court be affirmed in the *Aircraft & Diesel* case, the appeal herein be dismissed or, in the alternative, that the judgment below be affirmed, pursuant to paragraph 3 of Rule 12 of this Court.

George T. Washington (M. F.),
GEORGE T. WASHINGTON,
Acting Solicitor General.

NOVEMBER 1946.

Copy Received November 8, 1946.

PAUL B. ELCAN,
Attorney for Plaintiffs-Appellants.

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No. 724. WADE ET AL., DOING BUSINESS AS CADILLAC TOOL & DIE CO., ET AL. *v.* STIMSON ET AL. Appeal from the District Court of the United States for the District of Columbia. June 16, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, decided this day. *John W. Piester* and *Paul B. Elcan* for appellants. *Acting Solicitor General Washington* for appellees. Reported below: 65 F. Supp. 277.